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No. 06-1278

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IN THE

Supreme Court of the United States

MARTIN A. ARMSTRONG,

Petitioner,

v.

JOSEPH R. GUCCIONE, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK; MARVIN D. MORRISON, WARDEN, METROPOLITAN CORRECTIONAL CENTER; and ALAN M. COHEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Pursuant to Supreme Court Rule 15.8, and in response to an inquiry by the Clerk of this Court as to the possible mootness *vel non* of his petition for a writ of certiorari, petitioner Martin A. Armstrong (Armstrong) respectfully submits this supplemental brief.[1] As explained herein, Armstrong's petition is not moot. Indeed, Armstrong's constitutional and statutory challenges to his more than seven years' imprisonment for civil contempt are controversies that remain very much alive and in need of resolution by this Court.

Since Armstrong's petition was filed on March 19, 2007, there have been two new developments in the district court proceedings to which Armstrong is a party. First, on April 10, 2007, Armstrong was sentenced to sixty months' imprisonment for his criminal conviction. Over Armstrong's objection, the sentencing judge ordered that the criminal sentence would not commence until his civil contempt case ended. The sentencing judge also ordered that Armstrong would receive no credit against his criminal sentence for any time he already had served for civil contempt.

Second, on April 27, 2007, the district judge who was reassigned the civil enforcement actions convened a new hearing on Armstrong's civil contempt. At the conclusion of the hearing, the court discontinued Armstrong's confinement for civil contempt based on its determination that continued incarceration would no longer have any coercive effect. The district judge also ordered Armstrong to begin serving his criminal sentence, in accordance with the judgment previously entered by the criminal sentencing judge.

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[1] Part IV of Armstrong's petition argued that several pending district court proceedings would not moot his case. Now that those proceedings have concluded, this brief updates and supplements Armstrong's previous arguments.

I. The Petition Is Not Moot Because The Contempt Proceeding Delayed Commencement Of The Criminal Sentence That Armstrong Is Presently Serving.

As a matter of Article III jurisdiction, this case is plainly not moot. Armstrong's confinement for civil contempt – the length of which he challenges on constitutional and statutory grounds – delayed the start of his criminal sentence. As a result, the legality of the civil confinement remains a live case or controversy.

It is settled law that when a term of civil confinement delays or interrupts a pending criminal sentence, any challenge to the contempt sanction is not moot, even after the contempt order is vacated. *See, e.g., In re Altro*, 180 F.3d 372, 375 n.3 (2d Cir. 1999); *Mosley v. United States*, No. 92-1263, 1994 WL 246077, at *1 (7th Cir. June 3, 1994) (unpublished order); *In re Grand Jury Proceedings*, 588 F.2d 429, 429 (5th Cir. 1979) (per curiam); *Bruno v. Greenlee*, 569 F.2d 775, 776 n.2 (3d Cir. 1978) (per curiam). Furthermore, if some period of the civil confinement is later held to have been unlawful, the contemnor must receive credit at least for the length of time that it tolled his criminal sentence. *See In re Altro*, 180 F.3d at 375 n.3; *In re Grand Jury Proceedings*, 541 F.2d 464, 464 (5th Cir. 1976) (per curiam) (holding that civil contemnor held beyond expiration of grand jury would receive credit against even an *unrelated* criminal sentence that was interrupted by his civil incarceration). The possibility of receiving credit against the criminal sentence gives the contemnor a "personal stake in the outcome" of the litigation that satisfies constitutional requirements of justiciability. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (citation omitted). These principles hold equally true where the prisoner challenges an already-completed period of civil contempt – as here – through a habeas action under 28 U.S.C. § 2241. *See Bruno*, 569 F.2d at 776 & n.2.

Although Armstrong was sentenced on April 10, 2007, his sentence did not begin to run until the civil contempt ended seventeen days later on April 27, 2007. If this Court were to determine that any portion of Armstrong's confinement for civil contempt was invalid for any of the reasons advanced in his petition, he would be entitled to credit, at a minimum, for the intervening days between April 10 and April 27. However short, the length of that delay is not material to the justiciability of the case. Because the contempt sanction caused the criminal sentence to end "later than it would have ended if there had been no [delay]," *id.*, Armstrong's challenge to his civil confinement is not moot.

II. The Petition Is Not Moot Because Armstrong Would Be Entitled To Credit Toward The Completion Of His Criminal Sentence For *Any* Period Of His Civil Incarceration That This Court Held Was Unlawful.

This case is also not moot because a live controversy remains as to whether Armstrong should receive credit for all or most of the time period that he was unlawfully imprisoned for civil contempt prior to imposition of his criminal sentence. Armstrong was incarcerated for over seven years prior to commencement of his criminal sentence – five and one-half years more than the maximum eighteen months allowed by the Recalcitrant Witness Statute, 28 U.S.C. § 1826(a). Reversal of the Second Circuit's decision would thus entitle him to immediate release from the five-year sentence he is serving.

In the one analogous case of which we are aware, the Sixth Circuit held that two civil contemnors, who were unlawfully imprisoned beyond Section 1826(a)'s maximum eighteen months, were entitled to credit for the excess time toward the completion of their subsequently-imposed criminal sentences. *See United States v. Mitchell*, 556 F.2d 371, 385 (6th Cir. 1977).

Similarly, Armstrong contends that his civil contempt sanction was governed by Section 1826(a) and the Non-Detention Act, 18 U.S.C. § 4001(a), and thus his imprisonment for civil contempt should have ended in July 2001 and not gone beyond eighteen months. The petition also challenges the duration of his confinement on constitutional grounds, arguing that it violated the Due Process Clause. Even though Armstrong's confinement for civil contempt has ended, a live controversy remains as to whether he should receive credit for the unlawful period of civil confinement that he served prior to his criminal sentencing – which, at a minimum, exceeded five and one-half years.

It is therefore critical that this Court grant certiorari and reverse the Second Circuit's decision below – which defies controlling constitutional and statutory principles and is inconsistent with the decisions of other circuit courts – so that Armstrong can receive credit against his criminal sentence for the period that he was unlawfully imprisoned and qualify him for immediate release.

Accordingly, the petition is not moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

May 11, 2007

Respectfully submitted,

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